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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 405

SATIRIS G. FASSOULIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Statement

The Government's brief in opposition to the petition for a writ of certiorari herein is, of course, designed to lead this Court to believe that there is involved herein no issue of law of national importance requiring examination and exposition by this Court.

The Government resorts to inferences built upon inferences, it is respectfully submitted, in giving its version of the facts. Unfortunately the Government's treatment of the facts may serve to draw the attention of this Court away from the legal issues. And it may have been designed for such purpose.

The Government therefore, in over-emphasizing factual issues, slurs over or fails to respond to heretofore undecided legal points of national import which make a review by this Court so imperative.

In weeding out worthy causes for review, protection of fundamental civil rights of individuals, created by the Constitution, such as petitioner's right to a speedy trial under the Sixth Amendment, and the construction of a Federal statute of broad application today such as the wire-fraud statute, should be accorded the same attention as questions of immediate historical and political significance to the nation at large. Such is the intent of our Constitution. This Court is respectfully urged, therefore, to accept the petitioner's cause for the careful examination it can be given only after full briefing and oral argument.

The Government's Treatment of the Facts

The Government, in its opposing brief, has supplied and inferred some facts which petitioner contends are not supported by the evidence. This may be due in part to reliance upon some wayward findings of the District Court likewise claimed to be unsupported by the evidence.

The Government has built inference upon inference. Moreover, facts finding support in the evidence and favorable to the petitioners, it is respectfully submitted, have been suppressed by the Government.

This treatment demands a dissection of the Government's factual assertions, even though we are now concerned only with points of law. Therefore, we take up the Government's factual assertions in their sequence.

1. The Government asserts that "petitioner made numerous efforts to induce A. Mitchell Liftig to contribute stock from four corporations, * * *" (p. 4). The record is absolutely devoid of any evidence of such efforts.

2. It asserts that "In order to convince Liftig to merge his companies, petitioner made a large number of false representations, * * *." (Reference is made to proof of falsity by extrajudicial admissions which should not have been admitted by the trial court.) There is absolutely no evidence that any false representations were made "to convince" Liftig. They were made for Fox's ears—by Liftig's own testimony, elicited by the Government itself (86a, 294a, 295a). Petitioner wanted to stall Fox so he would not sell the SS Whitehead in the face of a rising market. As a matter of fact, the testimony is undenied that petitioner wanted no part of any of the companies purportedly represented by Liftig (276a, 277a, 279a, 281a, 282a) as against the absence of any evidence whatsoever that petitioner wanted a part, as falsely asserted by the Government. And when the deal closed, the entire matter of the merger of the companies had been dropped long before the alleged interstate telephone call upon which the Government depends for this Court's jurisdiction.

3. Petitioner is then stated to have produced fictitious contracts and done certain other things. Unfortunately, the erroneous impression is left that petitioner did these things to do Liftig out of property.

4. The Government calls James Eichler a "fictitious person" (p. 5), when it was proved and admitted below that there was such a person, using or calling himself by that name.

5. When the Government states that petitioner "thereupon produced 346 counterfeit A.T. & T. debentures," it might be erroneously inferred that petitioner knew they were counterfeit. There is no evidence of such knowledge on the part of the petitioner. The evidence is definitely to the contrary (101a, 123a, 130a, 164a, 190a, 290a).

6. On December 15, 1955, again it is erroneously inferred that petitioner knew the bonds were counterfeit

when he waited at the New York attorney's office for instructions from the Akron Bank (p. 5).

7. It is then left to inference that the telephone call from the Vice-President of the Akron Bank to the Chemical Bank in New York was from a point in Ohio. Likewise, the same inference is left as to the telegram which came after the loan was made and was *ex post facto*. Neither inference is proper and the interstate character of the communication is a jurisdictional fact which should be proved by more than inference built upon inference.

8. It can be inferred from the Government's brief that there is some connection between petitioner's move to contact Liftig to tell him the bonds were spurious and the article published in The New York Times on December 21, 1955. It is again left to inference that such fact might impute knowledge of the spurious character of the bonds to petitioner.

9. In its argument on the proof of the interstate character of the wire communication, the Government again resorts to inference (p. 7). It states: "But interstate communication between the New York and Akron Banks was clearly within the contemplation of the scheme, and it was reasonably foreseeable that this interstate communication would be by wire." Here again, inference leads astray. If we are concerned only with the alleged scheme to defraud Liftig, to which the trial court has limited the issues, the alleged interstate wire had nothing whatsoever to do with such scheme. Moreover, it is not clear from the evidence that petitioner even knew a wire would be necessary. Knowledge of the need for a wire should not be imputed when time was not found to be of the essence of the loan contract. Other modes of communication were available and petitioner had no control over them. Again, the false inference would be that petitioner knew the bonds were counterfeit when there is no such evidence.

10. As to the alleged interstate character of the telephone call, this is also built by piling inference upon inference. The Government either carelessly or purposely failed to prove the physical locations of the colloquists. Now it seeks to mend the defect. The only shred to lean upon is the telegram, but that obviously does not prove the physical locations of the colloquists at the time of the telephone conversation, and it was *ex post facto.*

The dangers inherent in the building of inference upon inference can only be eliminated by the action of this Court.

Unfortunately, the Government's factual synopsis would lead one to believe that petitioner is a malicious rogue. The evidence is so much to the contrary that it should be summarized.

1. There is no evidence that petitioner at any time requested or desired any part of the four companies Liftig stated he represented.

2. There is evidence that petitioner rejected such a possibility (282a).

3. There is no evidence that petitioner had reason to suspect that the A. T. & T. bonds were spurious until December 21, 1955, six days after the close of the transaction.

4. The petitioner is the only one who instigated an investigation to determine the validity of the bonds and he did this instantly upon receiving information on December 21, 1955 (101a, 123a, 130a, 164a, 190a, 290a).

5. Even after being advised by the Bank that the bonds were legitimate, petitioner insisted that said bonds be sent to the Transfer Agent to determine their authenticity (id.).

6. Petitioner thereafter paid off the Bank which made the loan (223a, 225a, 227a, 297a). Only the petitioner lost money.

7. The lending bank thereafter did business with the petitioner (224a, 225a).

8. The Government's chief witnesses thereafter did business with the petitioner, including Liftig, attorneys Moraites and Purcell, the First National Bank of Akron, and the Chemical Bank and Trust Co. of New York (134a, 176a, 212a, 213a, 224a, 225a).

This is not the activity of one with criminal intent. See *United States* v. *Brandt*, 196 F.2d 653, 657 (C.C.A. 2d, 1952); *United States* v. *McNamara*, 91 F.2d 986, 992 (C.C.A. 2d, 1937). The petitioner, an American citizen, at the age of 40, who has rendered such great service to his country both during the war and thereafter, stands to have his life ruined by a verdict based upon inferences piled upon inferences. And there is not one shred of evidence in the record to show even a shadow of intent on his part to defraud.

Concerning Petitioner's Denial of a Speedy Trial

The Government is still unable to distinguish between a delay between the filing of a complaint and the indictment and trial and a delay between the indictment and the trial. The petitioner has made the distinction clear in its petition. Rule 48 of the Federal Rules of Criminal Procedure is patently unconstitutional insofar as it conflicts with the Sixth Amendment, especially if construed as the Government would seem to contend.

In each case cited by the Government, a delay took place of from two to four and one-half years between the indictment and the trial, and the defendant failed to move for a speedy trial during that time. The defendant in each of

the cases cited knew he was legally charged with an offense and that the charge had ripened into a triable issue. Therefore, such defendant was in a position to move for a speedy trial. Not so a defendant who does not know whether he will ever be indicted. A complaint is only an accusation and *nothing more.*

Concerning the Failure of the Wire-Fraud Statute to Include an "Attempt" When Otherwise Patterned After the Mail-Fraud Statute

The record below shows no executed scheme as to Liftig but only an endeavour by the Government to prove at most an *attempt* which does not come under the "wire-fraud" statute, and is punishable only under state statutes, if at all. Certainly, an attempt could not be regarded as interstate.

However, since, as to Liftig, there was no executed scheme, the Government at this late date is endeavouring to mend its bridges. After stating that the banks were named in the indictment as petitioner's victims, as well as Liftig, the Government now boldly states (p. 6 of its brief):

> "Petitioner deliberately and successfully led the banks to accept counterfeit securities as genuine securities and to lend money thereon. The banks were therefore actually defrauded."

For the foregoing reason, the Government probably has seen fit to disregard totally petitioner's Point IV which treats only of the endeavour of the Government to prove an abortive attempt to defraud Liftig.

The Government, it is submitted, has taken unauthorized liberties in thus adding to the findings of the trial court. There is no finding by Judge KAUFMAN in the District Court that petitioner successfully executed a scheme to defraud

the two banks. The verdict is based upon a finding of a scheme whereby an alleged attempt was made to defraud Liftig. And Liftig was the only victim with which the trial court was concerned.

The only issue at trial was the alleged attempt to defraud Liftig. This was an intrastate, not an interstate problem, as we pointed out in our petition. The wires belong to private companies, the mail box to the Government. So the word "attempt", used in the mail-fraud statute, was purposely omitted from the wire-fraud statute.

It is true that under the mail-fraud statute, expressly including an "attempt," a completed and successful fraud is unnecessary. The *Sylvanus* and *Feldman* cases (top of page 7) are both under the mail-fraud statutes and therefore inapplicable. The *Hoffman* case involved the wire-fraud statute but there we have a scheme executed in interstate commerce. It was not successful in the sense that the victim lost anything. But it was completed. Therefore, it too is inapplicable.

The Government has utterly failed to respond directly to petitioner's point by proposing a new finding that petitioner defrauded the banks in an executed scheme. By indirection, the Government thereby is admitting that the scheme to defraud Liftig was never executed and is endeavouring to rebuild or bolster its case because of failure of evidence on this essential point.

It is respectfully submitted that this Court must disregard these new findings proposed by the Government as unauthorized and as extending the findings of the trial court beyond the scope of evidentiary support.

Furthermore, this new wire-fraud statute has never before been construed or interpreted by this Court. The case at bar requires its interpretation.

Concerning the Fatal Variance

It is not necessary in a case of this kind to show that the defendant has been misled, as the Government would have us believe. The variance is too glaring and the effect of the variance is too obvious. *Stirone* v. *United States*, 361 U.S. 212 (1960); *United States* v. *Rowe*, 56 F. 2d. 747, 749 (C.C.A. 2d., 1932) cert. den. 286 U.S. 554.

Conclusion

It is respectfully submitted that a manifest attempt has been made by the Government to over-emphasize factual issues when the main points are strictly legal, such as:

(1) Can the wire-fraud statute apply to an "attempt" to defraud, even though an "attempt" is omitted from the statute and is strictly an intrastate act?

(2) Did the petitioner have the speedy trial he is entitled to under the Sixth Amendment?; and

(3) Was there a fatal variance as defined by this Court in the *Stirone* case?

These questions all have nation-wide significance and demand full presentation to and consideration by this Court.

It is respectfully submitted that the petition for a writ of certiorari herein should therefore be granted.

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